No. 11,016

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

EAST ST. JOHNS SHINGLE CO., INC. (A CORPORATION), APPELLEE

BRIEF FOR APPELLANT

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JURISDICTION

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Oregon in an action by the Price Administrator under the Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 636) seeking damages under Section 205 (e) as amended (50 U. S. C. App. Sec. 925 (e)). The judgment dismissing the action was entered December 19, 1944 (R. 18–19). Notice of Appeal was filed February 24, 1945 (R. 20).

Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U. S. C. App. Sec. 925 (c)) as indicated in the complaint (R. 3) and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942, Maximum Price Regulation No. 164 ("Red Cedar Shingles") and the General Maximum Price Regulation.

1. *The Statute.*—Pertinent provisions of the Emergency Price Control Act as amended are as follows:

> SEC. 4. (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> * * * * *
>
> SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable*

attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.[1] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[2] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not en-*

[1] As amended by Section 108 (b) of Stabilization Extension Act of 1944, 58 Stat. 636. Formerly read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the Court."

[2] Added by Section 108 (b) of Stabilization Extension Act of 1944.

titled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.[3] [*The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act*

[3] As amended by Section 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

and with respect to proceedings instituted thereafter.][4]

2. *The Regulations.*—A. *Maximum Price Regulation 164* (8 F. R. 2872, 12296):

SEC. 1381.2. Items not priced. (a) If a seller wishes to sell a grade or size which is not specifically priced in the price tables, or wishes to make an addition for specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D. C., for a maximum price. He must provide the following information:

(1) The requested price;

(2) A complete description of the item, practice or service for which approval is requested;

(3) The price differential between it and the most comparable item in the price tables, between October 1, 1941 and June 1, 1942, from the seller's own records, or if that is impossible, from the experience of the trade. If no established price differential which can be used for comparison existed, a detailed analysis of the calculation of the price should be furnished.

(b) As soon as the request has been filed, quotations, and deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram.

* * * * *

Sec. 1381.11. Appendix A: Maximum prices for red cedar shingles. (a) The maximum

[4] Matter in brackets added by Section 108 (c) of Stabilization Extension Act of 1944. The reference to "subsection (b)" is to Section 108 (b) of that Act.

price f. o. b. mill per square, green or dry, when graded in accordance with U. S. Department of Commerce, Commercial Standards C. S. 31–38 for Red Cedar Shingles for No. 1 grade and in accordance with the Standards and Grading Rules of the Red Cedar Shingle Bureau as revised June 1, 1939 for No. 2 and No. 3 grades, in mixed or straight load shipments, shall be:

Length and thickness	Width	Grade		
		No. 1	No. 2	No. 3
16″ 5/2 (XXXXX)	Random	$4.35	$3.50	$2.45
	5″	5.10	4.25	3.20
	6″	5.20	4.35	3.30
18″ 5/2½ (Perfections)	Random	4.75	3.65	2.60
	5″ or 6″	5.50	4.45	3.35
18″ 5/2 (Eurekas)	Random	4.55	3.55	2.50
24″ 4/2 (Royals)	Random	5.85	4.00	2.65

B. *General Maximum Price Regulation* (7 F. R. 3153, 4659):

SEC. 1 [§ 1499.1]. *Prohibition against dealing in commodities or service above maximum price.* On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation.

* * * * *

SEC. 21 [§ 1499.21]. *Effect of other price regulations.* Sections 1499.13, 1499.14, 1499.15, 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this General Maximum Price Regulation shall not apply to any sale or delivery for which a

maximum price is in effect, at the time of such sale or delivery, under the provisions of any other price regulation issued, or which may be issued, by the Office of Price Administration, unless otherwise provided in any such price regulation.

STATEMENT OF THE CASE

This suit was based on three causes of action (R. 2–6) for overcharges in the sale of various types of shingles under Maximum Price Regulation 164 ("Red Cedar Shingles"). Only the first cause of action is involved in the appeal (R. 33). This first cause of action was for overcharges in the sale of a low-grade type of shingle known as "undercoursing."

The court below found in the Memo of Decision (R. 17)—which was incorporated into the Findings and Conclusions (R. 18)—that plaintiff had established a cause of action for "single damages." The reason for limiting the recovery to single damages was the Court's further findings that defendant's conduct had not been wilful or the result of failure to take practicable precautions (R. 18)—thus limiting the plaintiff Price Administrator to recovery of only the single overcharge, pursuant to Section 205 (e) of the Act as amended.

However, coupled with this finding for recovery of single overcharges was the further finding that the suit had been instituted without lawful authority because the Act did not permit the Price Administrator to delegate the suit—bringing function. Consequently, in spite of the right to recovery of single

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damages had the suit been lawfully instituted, the Court concluded that the suit must be dismissed (R. 19).

SPECIFICATIONS OF ERROR

1. The Court below erred in finding and concluding that the Act did not permit the plaintiff Price Administrator to delegate the discretionary authority to institute suits.

2. The Court below erred in failing to enter judgment for the "single damages" which it found the Administrator was entitled to recover.

3. The Court below erred in dismissing the action.

ARGUMENT

The suit being authorized, judgment should have been entered for single damages on the basis of the Court's own findings

(1) The Administrator's delegation of the authority to institute suits, to, *inter alia,* the Regional Enforcement Attorney or his delegate, was made in Revised General Order 3 (R. 29) issued June 10, 1943, and suit was instituted pursuant to that authority (R. 28) on June 26, 1944 (R. 6). In addition, the suit was ratified by the Administrator on September 7, 1944 (Second Revised General Order 3, 9 F. R. 11137).

The ruling of the Court that the Act does not authorize the Administrator's delegation of the authority to institute suits under Section 205 (e) raises precisely the issue involved in *Bowles* v. *Wheeler,* No. 10924, which has just been decided adversely to appellee's contention (August 2, 1945).

(2) Since, then, the suit was lawfully instituted, it follows in the present case that judgment should have been entered for single damages. The Court specifically found the Administrator was entitled to recovery of single damages (R. 17–18) and would clearly have entered judgment therefor had it not been for the ruling on the authority to institute suit. Appellee has not cross-appealed from the finding for single damages, and it is therefore conclusive here.

It is not clear, however, whether the Court's finding for recovery of "single damages" is for recovery of the overcharges *specified* in the complaint, or whether it is for the amount exceeding the applicable maximum price. The uncertainty arises from these facts: As appellee conceded at the trial, a maximum price of $2 for these undercoursing shingles had been established, pursuant to appellee's application, under Section 1381.2 of Maximum Price Regulation 164,[5] which provided for applications for prices where the particular item was not specifically priced by the Regulation. The first violative sale listed in Exhibit A of the complaint, being dated August 14, 1943, occurred prior to the promulgation of Section 1381.2;[6] and since the undercoursing shingles could not be priced under MPR 164,[7] that sale was governed by the General Maximum Price Regulation.[8] The computation of overcharges for the August 14 sale was made on the basis of a $2.10

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[5] Transcript of Trial Proceedings, pp. 8–11, 98, 106–07, printed as Appendix to this Brief.

[6] This section of the Regulation became effective September 9, 1943. (8 F. R. 12296.)

[7] Transcript, supra, p. 11. See Appendix herein.

[8] F. R. 3153, 4659. See text, supra, p 6.

maximum price under the latter Regulation, and this maximum was (mistakenly) used as a basis for estimating the overcharges for the later sales.[9] (R. 26–27).

It is therefore submitted that the judgment should be reversed with instructions that judgment be entered on the first cause of action for single damages, computed by reference to the maximum price applicable under the General Maximum Price Regulation for the August 14, 1943, sale, and under Maximum Price Regulation 164 for the sale, thereafter.

Respectfully submitted.

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[9] This was done because the local office was then unaware that a specific maximum price of $2 had already been established by the Administrator, pursuant to application to the Washington Office.

APPENDIX

Excerpts From Transcript of Trial Proceedings

(Note: The entire record was designated by the appellant (R. 21–22) but only a small part was designated for printing (R. 34). Appellant has filed a request that the Court consider the following matter along with the printed record.)

Testimony of W. F. Johnson.

P. 6. Direct examination by Mr. McCaffery:

Q. Would you please state your name?

A. W. F. Johnson.

Q. And your address?

A. 1331 Southwest Twelfth, Portland.

Q. And your present occupation?

A. Lumberman.

Q. Mr. Johnson, were you ever employed by the Office of Price Administration in the local District Office in Portland?

A. I was.

P. 7 Q. In what capacity, Mr. Johnson?

A. Investigator.

Q. And during what period, Mr. Johnson?

A. I think I went to work November 1st, 1943; I believes that is when it was; and I worked for them until sometime August or September, I have forgotten just what the date was, of this last year, 1944.

Q. And what branch of the OPA were you an investigator for, Mr. Johnson?

A. The Enforcement, Price Enforcement Division, I believe.

Q. What particular division?

A. Maximum Price regulation. Is that what you mean?

Q. In regard to what commodity, Mr. Johnson?

A. Oh. Lumber and shingles.

Q. And would you kindly state for the Court, Mr. Johnson, your experience in regard to lumber.

A. Well, I have had over thirty years' experience as a retail lumber dealer, where I had lumber, shingles, and mill work; and then I have had about fifteen years—well, about ten years as a lumber manufacturer and logger, and about five years as a wholesaler.

Q. And what period of your lumber experience has been in Oregon, Mr. Johnson?

A. Since 1919.

P. 8 Q. And have you had any particular experience with shingles, Mr. Johnson?

A. Well, I always handled shingles in my retail lumber business, and then after that shingles were part of the lumber business. If you know lumber, why, you know something about shingles.

Q. And in your capacity as a lumber investigator for the Office of Price Administration, Mr. Johnson, did you have occasion to make an examination of the records of the East St. Johns Shingle Company of Portland?

A. I did.

Q. What was the purpose of your investigation, Mr. Johnson?

A. To find if there had been any price violations of the OPA regulations, M. P. R., I think we called it, 164—Maximum Price Regulation No. 164 and its amendments.

Q. You are familiar with that regulation, Mr. Johnson?

A. Yes, I was at the time. I guess I still remember most of it.

Mr. McCaffery. Would you be kind enough to hand this Maximum Price Regulation 164 as amended to Mr. Johnson?

Mr. Powers. Does that have all the amendments on it?

Mr. McCaffery. It has all the amendments up to R. M. P. R. 164, which is not involved in this case.

Mr. Powers. That is the one of October?

Mr. McCaffery. That is, the Revised which I mentioned in the pre-trial is not involved in this case.

Mr. Powers. As far as I am concerned, you may state to the Court what it is.

P. 9. Mr. McCaffery. I have.

Mr. Powers. Well, in other words, I had as soon as you would describe it as Mr. Johnson, if you want to introduce it in evidence.

Mr. McCaffery. I am not using it to introduce in evidence, Jim. I want Mr. Johnson to look through that and see if he can find the price for No. 1 shingles.

Mr. Powers. We will object to that. The records speak for themselves. Mr. McCaffery can tell you what it is, your Honor, and there will be no question about it.

The Court. He may answer subject to the objection.

Mr. McCaffery. Mr. Johnson, would you examine that regulation and tell me what the price is for No. 1 shingles?

A. Well, they were different prices at one time.

Q. You can qualify your answer, Mr. Johnson, in stating ——

A. How?

Q. You can qualify your answer in stating the date to which you refer when you give me the price of No. 1 shingles.

Mr. Powers. May I interpose this objection? There is no question here about the charge for No. 1 shingles, nothing whatsoever—nothing in any one of these three causes of action that I know of.

Mr. McCaffery. That is true, your Honor. The only purpose is having Mr. Johnson find the price of No. 1 shingles is to show his familiarity with the regulation and the use of the same.

A. The price was $4.00 on No. 1, three and a quarter on No. 2.

P. 10 The COURT. Where are you looking, Mr. Johnson?

A. Amendment No. 5.

The COURT. All right.

A. Four and a quarter on No. 1, three and a quarter on No. 2 and two and a quarter on No. 3 at that time.

Mr. MCCAFFERY. Mr. Johnson, from an examination of the regulation, can you tell me what the price for undercoursing, or a cull-type of shingle, commonly known in the trade as No. 4, is?

Mr. POWERS. We will object to what it is "commonly known in the trade as," your Honor.

Mr. MCCAFFERY. I will withdraw that question.

Q. Mr. Johnson, from your experience in the lumber business and familiarity with shingles, have you ever had occasion to be concerned with what is known as undercoursing?

A. I have.

Q. And what in your opinion, Mr. Johnson, is undercoursing?

A. Well, it is a very low grade; it is an offgrade, a very low grade of shingle that was generally prior to the war used for where you were going to side your house, or something of that kind, and you wanted to put on an undercoursing, as they then called it, and then you afterwards put on a shingle over that; it might have been a No. 1 or it might have been a shake, or it might have been some other type, but it was used as additional protection against the weather and being a very cheap type of article that is what it was known as—undercoursing.

P. 11 Q. Mr. Johnson, is it so commonly known in the trade?

A. Yes. I think that was the common practice.

Q. Mr. Johnson, from an examination of M. P. R. 164 as amended, can you determine a price for this type of shingle known as undercoursing, or commonly known as No. 4 shingle?

A. There was no price on that type of shingle. When they made this regulation—it is proper to say something? If it is not proper——

The COURT. Yes.

The WITNESS. When they made this regulation the effort was made to cut down and eliminate as much as possible, and simplify it, I might say, so they made the three grades, which were standard grades, and No. 4—the regulations carried a clause stating that on anything other than those three grades the manufacturer who wants to put that on the market shall write to the Office of Price Administration in Washington, or get it through the Branch Offices. I think either way, and get a price, a special price. He shall describe the article which he proposes to make and as well the price which he wants for it, and then they set a price for it.

* * * * *

Testimony of WESLEY W. GOTCHER.

Direct examination by Mr. POWERS:

p. 97 Q. State your name, please.

A. Wesley W. Gotcher.

Q. You are the president of the East St. Johns Shingle Company?

A. That is right.

* * * * *

p. 98 Q. Was undercoursing covered by the regulation that first came out?

A. No.

Q. And the first time you got a price is when you wrote in for it?

A. That is right.

* * * * *

Testimony of GERTRUDE GOTCHER.

p. 106 Direct Examination by Mr. POWERS:

Q. Your name is Gertrude Gotcher, you are the wife of Mr. Gotcher, and you are the secretary-bookkeeper of the defendant?

A. Yes.

Q. Mrs. Gotcher, with respect to the first cause of action, which is the undercoursing, do you know how it was that—or was there a price on that at all until you wrote in to get a price?

A. I never knew of any.

Q. And what brought it to your attention that you should write in?

A. Well, through numerous conversations with my brother, of the Portland Shingle Company, who, in so many matters, had more information than we did because he belonged to the Advisory Committee.

Q. He is a member of the Advisory Committee of the Cedar Shingle Industry?

p. 107 A. Yes, sir.

Q. Advisor of the OPA?

A. Yes, sir.

Q. And when you knew about that you wrote in, did you, and got this information?

A. Yes.

Q. Did you sell any of this undercoursing or backing after you were told the price would be $2.00 at a higher price than two?

A. No. It was never our intention to, and I don't believe we did. However, it appears there is one car that got out at a price, how I don't know, because we had other people working in the office. But there is one on the record. It was never our intention to go above the ceiling price after it was established.

U. S. GOVERNMENT PRINTING OFFICE: 1945